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Supreme Court, U.S.
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No. 91-756

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1991

FRANK L WHITMER AND JOAN P WHITMER,
Petitioners

v

JOHN HANCOCK MUTUAL LIFE INSURANCE CO., SKIDMORE, OWINGS AND MERRILL, SUDLER AND CO., SUDLER MARLING, INC., TISHMAN CONSTRUCTION CO., ALUMINUM COMPANY OF AMERICA, ADMIRAL HEATING AND VENTILATING, INC., R B HAYWARD CO., UNIVERSAL SHEET METAL CORP. d/b/a UNIVERSAL-HAYWARD, CUPPLES PRODUCTS CORPORATION, a DIVISION OF H H ROBERTSON CO., H H ROBERTSON CO., 175 EAST DELAWARE PLACE HOMEOWNERS ASSOCIATION, H S NACHMAN AND ASSOCIATES, INC., ENVIRONMENTAL SYSTEMS DESIGN, INC., L C KOHLMAN, INC., GENERAL PARKING CORPORATION, WILSON & McILVAINE, CITY OF CHICAGO, and DOES 1-50 INCLUSIVE,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONERS' REPLY TO BRIEFS IN OPPOSITION

Frank L Whitmer and Joan P Whitmer
American Citizens on their own behalf, Petitioners
221 Pardridge Place, DeKalb IL 60115, 815/758-7272

LAWtority Jan 1992

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REFERENCES TO RESPONDENTS

"Hancock" is the brief submitted by respondents John Hancock Mutual Life Insurance Company, Sudler and Company n/k/a Sudler Marling, Inc., and General Parking Corporation.

"McIlvaine" is respondent and law firm Wilson & McIlvaine.

Respondents *L C Kohlman Inc* and *175 East Delaware Place Homeowners Association* adopted and joined in the briefs filed by the above respondents.

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DEFENDANTS AND THEIR ATTORNEYS CONTINUE TO ADVISE THE COURTS TO ACT AS THOUGH THESE UNITED STATES DO NOT HAVE A CONSTITUTION AND A BILL OF RIGHTS

That Are To Be Zealously Guarded By Each Branch Of Government, Executive, Legislative, And Most Exceptionally By The Judicial

Defendants confuse their narrow attitudes with appellants' clearly pled Questions Presented which appellants again reiterate and adopt from pages i and ii. Particularly their Question Number Nine:

> *"Whether a cause and an appeal can be dismissed by a court where the party was denied urgent medical care supported by physicians' sworn affidavits, and the denial of the medical care caused the procedural lapse leading to the dismissal, and no hearing was held.*

Defendants' three Questions Presented do not relate at all to any of those presented by the plaintiffs-petitioners. Defendant Hancock argues *"many points . . . none of which approach the kind of important constitutional or policy questions which this court should exercise its discretion to hear."* (Page 8); *"there is no conflict among the U. S. Courts of Appeals on the question of whether the Court of Appeals can dismiss an appeal pursuant to the Federal Rules of Appellate Procedure for an appellant's failure to timely file his brief."* (Page 9); *"the U. S. Court of Appeals for the Seventh Circuit followed its own circuit rules . . . ."* (Page 11); Defendant McIlvaine argues, *"The Seventh Circuit has the authority to dismiss appellant's case for failure to comply with court orders."* (Page i).

None of the defendants' positions argue plaintiffs-petitioners' nine proper Questions Presented, and totally distort the ninth question stated above.

Life, Liberty, Justice, Cruel and unusual punishments. Actually nothing is more important to an American citizen than our Declaration of Independence and its statements that *"We hold these Truths to be self-evident, . . . that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, . . ."* Also, there is no more important constitutional question presented than plaintiffs-petitioners' rights in our constitutional mandate to *"establish Justice, . . . and secure the Blessings of Liberty to ourselves and to our Posterity, . . . judges . . . shall be bound thereby . . . "* and of course our Bill of Rights and its prohibitions, *"nor be deprived of life . . . without due process of law . . . nor cruel and unusual punishments inflicted."* (Emphasis added.)

This question touches the foundation of this Court's ultimate responsibility to enforce the mandate of the Constitution that *"the judiciary has always borne the basic responsibility for protecting individuals against unconstitutional invasions of*

their rights by all branches of the Government", Stamler v Willis, 415 F2d 1365 (7 Cir., opinion by Circuit Judge Cummings, joined in by Chief Judge Swygert and District Judge Eschbach, August 5, 1969).

There is an affirmative primary and absolute judicial obligation to consider the legality of the courts' sua sponte actions. Mr Justice Jackson's well known closing words in his opinion in *Krulewitch*, 336 US 458, are always appropriate. *"The most odious of all oppressions are those which mask as justice."*

Conflicts between the circuits. Plaintiffs-petitioners had not needed to plead conflicts between the circuits considering the massive constitutional violations of life and death — both of body and of lawsuit — evidenced by this cause. For as recorded, there had been no meaningful due process provided to them.

But even in the question of conflicts between the circuits, the defendants are incorrect.

Obviously the law and the constitution recognize a court's right to dismiss.
But discretionary powers are not provided to be used as a weapon, intended or not, against plaintiffs-petitioners, and both time and health itself were used against them.

Plaintiffs-petitioners had won a reinstatement of their appeal after its improper dismissal upon the false representations by the defendants. Plaintiffs-petitioners had committed no improprieties or delays and were innocent of any improper actions. Actually they had almost three weeks remaining of their prior time to file their brief. They asked for the time and were denied and denied.

Plaintiffs-petitioners were given only six days in which the United States Court of Appeals for the Seventh Circuit ordered their brief filed (in known conflict with Joan P

Whitmer's petition for writ of certiorari to this Supreme Court of the United States, 90-1809.

Even a special rule in the Federal Circuit. If defendants had really made a reasonable inquiry of the proper subject for the question presented, and any related conflicts within the circuits, they would have found (exactly as plaintiffs-petitioners had asked) that the standard legal research references to the Federal Rules of Appellate Procedure show and commend that the Federal Circuit had established such a procedural rule effective on October 15, 1986, first as Rule 13 (now Rule 31(c)).

> *"**(c) Suspension of due date**. Motions which, if granted, would terminate the appeal will suspend the due dates for briefs. When such motions are denied, briefs will be due within the balance of the time permitted in this rule, but in no case fewer than 10 days from the date of the order, unless a different due date is set forth in the order."*

Abuse of Discretion in Flagrant Violation of Due Process. The Seventh Circuit had no reason to shorten the time for briefing to two pro se petitioner-appellants right after they had won a contested reinstatement of their appeal. The court abused its discretion through an impossible and unfair scheduling to destroy plaintiffs-petitioners' cause, as well as their appeal.

Under the special circumstances that existed, the denial of time and resultant dismissal of the appeal *"for want of prosecution"* is contrary to the constitutional right to due process of law.

The Seventh Circuit abused its discretion in (1) ignoring the documented life-threatening medical condition, (2) by ordering only six short working days to file the brief following the initial reinstatement of the appeal, and by (3) intentionally scheduling it for the same date as another major filing in the Supreme Court of the United States.

Error has been confessed as far as the respondents are concerned. They all ignored completely and did not argue the violation of due process in this cause.

This Appeal Is About A Life And Death Medical Emergency Where A Petitioner Was Denied Proper Time For Emergency Exploratory And Corrective Surgery Because The Court Insisted Its Schedule Took Precedence Over The Life And Health Of The Petitioner.

The respondents and the courts conspicuously avoid mention of the documented life-threatening health condition of petitioner Frank L Whitmer which, when ignored by the courts, had become multiple abdominal perforations diagnosed as requiring emergency surgery by the Mayo Clinic and petitioner's physicians.

Other courts also had their own schedules which also required compliance.
This is all a matter of record and referred to in petitioners' petition for writ of certiorari.

What the respondents did

Respondent Wilson & McIlvaine claims (page 10) this appeal is about "*extensions of time*." This is false pleading.

The defendants initiated the first improper dismissal of this appeal by their false pleadings claiming want of jurisdiction, and petitioners' appeal was dismissed.

Petitioners filed a timely (within 14 days) petition for rehearing to protect their appeal. The Seventh Circuit states *"Petitions for rehearing are filed in many cases, usually without good reason or much chance of success. Few are granted." Practitioner's Handbook for Appeals to the United States Court of Appeals for the Seventh Circuit,* 1991 edition, page 67.) *"In the relatively rare instance in which a petition for rehearing is granted, the procedure to be followed from that point forward is entirely discretionary with the court."*

The *"relatively rare instance"* occurred and the petition was granted reinstating the appeal (A8-9, Petitioner's brief). However, this was a hollow *"victory"* because of the court's ignoring the medical situation and the known conflict of filing between the Seventh Circuit and the Supreme Court of the United States on the same day, May 3, 1991.

The April 25, 1991 order vacated the court's prior dismissal. For the court **did** have jurisdiction, contrary to respondents' claims.

Prior to the issuing of that order, petitioners had asked the court to not schedule any proceedings until after a filing on May 3, 1991 in the Supreme Court of the United States. This request was denied in the April 25, 1991 order (A10, Petitioner's brief).

Petitioners again sought relief, while complying with the court's own established procedures. They asked in their emergency motion to place briefing in abeyance pending resolution of the district court's memorandum of its 60(b) inclination. This relief was denied on May 10, 1991. (A5-6, Petitioner's brief)

The court denied petitioner's May 24, 1991 petition for rehearing with suggestion for rehearing in banc. The court commented that no attempt to file a brief of appeal was made despite the *"numerous other filings."* The numerous other filings were pleas for help in handling a *"killer"* time schedule which petitioners knew they couldn't handle, and motions in an attempt to resolve the federal district court's pending 60(b) motion with the appeal, a perfectly legitimate procedure of the Seventh Circuit.

Furthermore, a brief on the merits is not written while ill and waiting for an appeal to be hopefully reinstated. Filing to vacate or for time for a procedural motion is far different than arguing substantive points of law. A full fifty page brief, citations, and short appendix is not a motion.

Conflict In The Circuits Not the Main Issue. The main thrust of respondents' brief in opposition is that there is no conflict among the United States Court of Appeals.

Again, that argument is wrong. Although petitioners never claimed there was a conflict in the circuits, there really is one. But respondents improperly dragged it in for their own purposes to divert the Court from the main issue — the gross violation of due process.

The issue is the court's failure to constitutionally adjudicate and administer their own rules. The rules are valid, and Petitioners were moving within the rules as spelled out in the Seventh Circuit's own *Handbook*.

Petitioners are not arguing that the Federal Rules of Appellate Procedure can be disregarded. To the contrary, Petitioners asked multiple times for relief, tried to follow the rules as best they could, and had legitimate, perfectly valid reasons for seeking the relief sought, namely, to have their Seventh Circuit's brief due date changed so it would not conflict with a filing in the United States Supreme Court on the same date.

Good cause was shown, exceptional circumstances existed and continue to exist, well supported by the sworn and uncontroverted medical affidavits provided the court. Petitioner's request for a very short period of time to avoid a conflict in filing dates resulted in the denial of that time.

Respondents' Cases Inappropriate. Respondents' cases cited on pages 10 and 11 are inappropriate.

D C Circuit: These petitioners complied with the rules. It was the Seventh Circuit's order they could not comply with. Petitioner's so advised the court on at least two occasions of the conflict in filing dates.

First Circuit: Petitioners' appeal was not dismissed for failure to file an adequate brief. The brief never was filed because of the time conflict, a Petitioner's

serious illness, and only six working days in which to prepare the brief. The Seventh Circuit was made aware of all of this and ignored it.

Second Circuit: In this Seventh Circuit case, the clerk was not directed to dismiss the appeal if the *"appellant failed to . . . within 30 days"*

Third Circuit: These Petitioners took all the necessary steps to prosecute their appeal, including a petition for rehearing to argue against respondents false claims of lack of jurisdiction. Their appeal was subsequently reinstated.

Fifth Circuit: The Seventh Circuit knew but ignored why Petitioners could not file their brief on the date set.

Seventh Circuit: Petitioners did not reach the point of filing a brief and had twice advised the Seventh Circuit of their conflict and situation.

Eighth Circuit: Petitioner's appeal was not dismissed for not being in compliance with the Federal Rules of Civil Procedure. Petitioners brief was not filed.

Ninth Circuit: An appellee did not move to dismiss this appeal. The court, on its own order, dismissed the appeal.

Seventh Circuit's Circuit Rule 31(c)(2). This rule does not provide for a procedure **PRIOR** to dismissal as stated by the respondents. PRIOR to does not comply with this Rule which states *"is not filed when due."*

"Filing of Briefs and Failure to Timely File Briefs.

(c) Failure of Appellant to File Brief. When an appellant's original brief is not filed when it is due, the procedure shall be as follows:

(2) All Other Cases: The Clerk shall enter an order directing counsel, or a pro se appellant, to show cause why the appeal should not be dismissed. The court will then take appropriate action."

In this case, the court acted prematurely in its dismissal of the appeal, in violation of due process.

Respondent Wilson & McIlvaine

This respondent, a law firm, states that a *"party's violation of briefing schedules and filing responsibilities is a serious matter."* (McIlvaine brief at page 6) This is a false statement — there was no ignoring or violation by petitioners. The Seventh Circuit was fully advised of the extraordinary facts and good cause which prevented petitioners from filing on the Seventh Circuit's May 3, 1991 due date.

This court is asked to take judicial notice of McIlvaine's ignoring of their own *"filing responsibilities."* Wilson & McIlvaine, when acting as counsel for Hancock, was admonished by the Illinois Appellate Court:

> *"More egregiously, counsel for defendants -- Burke, Wilson & McIlvaine and Phelan, Pope & John, Ltd. -- filed a joint brief that lacks citations to the voluminous record. (See 113 Ill.2d R. 341(e)(6), (7), 341 (f)). . . . we cannot excuse the noncompliance of two sizable and experienced law firms."*
>
> (June 29, 1990 order, page 8, 87-1211, *City of Chicago and Joan P Whitmer v John Hancock Mutual Life Insurance Company* et al.

These petitioners worked within the established rules, made the court aware of what they faced, medically, physically, and legally.

The Seventh Circuit didn't care.

Respondents' Misstatements Of Fact. Respondent Hancock's' page 3 distorts the title of Petitioner's Emergency Motion. The proper title is **"Plaintiffs' Emergency Objections to June 12, 1990 Hearing and Request for Ruling on Pending Motion for a Stay of Proceedings.**

Respondents' page 4 cites *"statutory provisions involved."* which are inapplicable to this case.

Why are respondents citing a section about filing the notice of appeal? Federal Rule of Appellate Procedure 3(a). Petitioner's filed their timely appeal, having received a proper time extension from the federal district court.

Why are respondents citing FRAP 31(c) *"an appellee may move for dismissal of the appeal . . ."* In this case, the appellee did not move for the dismissal of the appeal.

Respondents' page 5 fails to note that Petitioner's January 7, 1991 motion was to provide the court with a sworn medical affidavit in support of the time request for immediate exploratory and corrective surgery. This affidavit also provided a review of the pertinent medical facts leading up to this need for immediate exploratory and corrective surgery.

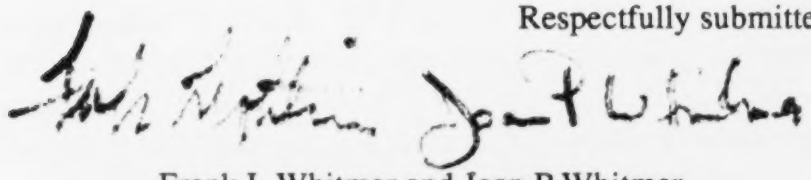
Respondents' page 5 misstates the January 10, 1991 order. The Seventh Circuit did not grant Petitioners' motion for an extension. The order reads, *"The court, on its own motion, ORDERS that briefing in this appeal will be held in abeyance pending a ruling on the pending motion for stay."* (Emphasis added.)

Conclusion. Sooner, or later, life—death—freedom—and health is exactly what liberty is all about.

Justice, due process, equal protection, and access to the courts count for something.

Petitioners ask that this Court issue its petition for a writ of certiorari to the Court of Appeals for the Seventh Circuit.

Respectfully submitted,



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